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Ansari Abdullah v Shalmon Sanangan

B HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO BKI-22–50/4 OF 2013
RAVINTHRAN J
7 MARCH 2016

C *Tort — Defamation — Libel — Postings on Facebook — Whether postings referred to plaintiff — Whether postings published to third parties — Whether postings defamatory of plaintiff — Whether defence of justification proven — Whether defence of fair comment proven — Whether there was malice on part of defendant — Whether plaintiff entitled to claim aggravated and/or exemplary damages*

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This was a libel action brought by the plaintiff against the defendant in relation to three postings by the defendant via the social networking service known as 'Facebook'. Publication 1 was in respect of defendant's posting on the Facebook page of one Albert Polinoh. The posting was prefaced by a photograph of the plaintiff and the caption 'Ketua Cabang PKR P170 Tuaran'. Publication 2 was in respect of the posting of the statutory declaration by one Charles Masuil on the Facebook wall of the defendant. In the statutory declaration, the plaintiff was alleged to have received a bag filled with cash from the brother of the Chief Minister of Sabah. Publication 3 was in respect of the same statutory declaration which was posted by the defendant on the wall of a Facebook group by the name of 'TUARAN Sembang2'. The defendant had not denied being responsible for all the postings in question but had raised the defences of justification and fair comment. The issues for determination were: (a) whether the Facebook postings referred to the plaintiff; (b) whether the said postings were defamatory of the plaintiff; (c) whether the defence of justification had been proven; and (d) whether the defence of fair comment had been proven.

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H **Held**, allowing the claim with costs of RM15,000:

(1) Publication 1 referred to a 'tn hj' which was an abbreviation of 'Tuan Haji'. It was not disputed that the plaintiff was referred as 'Tuan Haji Ansari' and the posting was prefaced by a photograph of the plaintiff. With regard to Publication 2 and Publication 3, the plaintiff was mentioned by name in the statutory declaration. Thus, there was no doubt that the said Facebook postings referred to the plaintiff. Further, in the trial, the defendant also admitted that the said postings referred to the plaintiff. The Facebook postings constituted publication to third parties as other individuals had read the statutory declaration and had made

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comments. Thus, the fact of publication and the fact that the postings referred to the plaintiff had been proven (see paras 17–18).

(2) The plaintiff was a senior lawyer and political leader at the material time, thus, to say that he had done a bad thing and that he had hidden agenda as stated in Publication 1 was clearly defamatory of him. With regard to Publication 2 and Publication 3, the central theme of the statutory declaration was that the plaintiff had stealthily received a bag filled with cash from the brother of the Chief Minister who was his political rival and that of his party. In the premises, the statutory declaration if read as whole, unmistakably insinuated that the plaintiff was corrupt and had betrayed his own party for monetary gain. Thus the statutory declaration was highly defamatory of the plaintiff (see paras 20–21 & 25–26).

(3) The statutory declaration and the belief of the defendant that it was truly affirmed were irrelevant to the defence of justification. Even if a handwriting expert had been called to prove that Charles Masuil affirmed the statutory declaration, the defendant was not relieved of the obligation to prove that the plaintiff had indeed received the bag of money from Datuk Ayob Aman. In this case, the defendant completely failed to prove such libelous allegation against the plaintiff. Further, the deponent of the statutory declaration, Charles Masuil also took the witness stand on behalf of the plaintiff and repudiated the contents of the statutory declaration. Thus the defence of justification collapsed in relation to all the publications (see paras 27–28).

(4) The defence of fair comment in relation to Publication 2 and Publication 3 failed because the publication was neither 'fair' in the sense that belief in it could be honestly held by the defendant nor was it a 'comment' as it was a pure allegation of fact and no more. The defence of fair comment could not apply to Publication 1 as well because the defendant failed to prove the fact that the plaintiff received a bag filled with cash from the brother of his political adversary (see paras 36–37).

(5) Even if the defence of fair comment succeeded, the defendant could not avail it because of the presence of actual or express malice. In this case, the defendant had attempted to sensationalise the publication of the statutory declaration by posting the remark 'BERITA HANGAT PILIHANRAYA ABAD INI!!' in bold. Further, the plaintiff was the Tuaran Parti Keadilan Rakyat ('PKR') Division Chief at the material time and was a potential candidate for the General Election. The national leaders of PKR were also in town on the eve of Publication 1. Therefore, a reasonable inference could be drawn that apart from being utterly reckless, the defendant had dishonest motive to attack the reputation of the plaintiff at a crucial time (see paras 38–39).

(6) It is trite law that once libel is proven, there is no requirement for the plaintiff to prove resulting damage for such damage is presumed. In this case, the court dismissed the claim for exemplary damages as it did not come within the principles set out in the case of *Rookes v Barnard & Ors* [1964] AC 1129. However the court found that the claim for aggravated damages has merit as the defendant had pleaded the defence of justification and had failed to prove it. Thus the court awarded the sum of RM70,000 as general and aggravated damages. The court refused to grant injunction as there was no evidence that the defendant had continued to publish similar publications (see paras 41–43).

[Bahasa Malaysia summary

Ini adalah tindakan libel yang dimulakan oleh plaintif terhadap defendan berkaitan tiga kiriman oleh defendan melalui perkhidmatan rangkaian sosial dikenali sebagai Facebook. Penerbitan 1 adalah berkenaan kiriman deefndan di halaman Facebook tentang Albert Polinoh. Kiriman itu didahului dengan gambar foto plaintif dan kapsyen 'Ketua Cabang PKR P170 Tuaran'. Penerbitan 2 adalah berkenaan kiriman tentang deklarasi statutori oleh Charles Masuil pada Facebook defendan. Dalam deklarasi statutori itu, plaintif dikatakan telah menerima beg yang penuh dengan wang tunai daripada abang Ketua Menteri Sabah. Penerbitan 3 adalah berkenaan deklarasi statutori sama yang telah dikirimkan oleh defendan pada dinding kumpulan Facebook dengan nama 'TUARAN Sembang2'. Defendan tidak menafikan bertanggungjawab untuk semua kiriman yang dipersoalkan tetapi telah menimbulkan pembelaan-pembelaan justifiksi dan komen adil. Isu-isu untuk ditentukan adalah: (a) sama ada kiriman Facebook merujuk kepada plaintif; (b) sama ada kiriman tersebut berunsur fitnah terhadap plaintif; (c) sama ada pembelaan justifikasi telah dibuktikan; dan (d) sama ada pembelaan komen adil telah dibuktikan.

Diputuskan, membenarkan tuntutan dengan kos sebanyak RM15,000:

(1) Penerbitan 1 merujuk kepada seorang 'tn hj' yang merupakan singkatan untuk 'Tuan Haji'. Ia tidak dipertikaikan bahawa plaintif dirujuk sebagai 'Tuan Haji Ansari' dan kiriman itu didahului dengan gambar foto plaintif. Berkenaan Penerbitan 2 dan Penerbitan 3, plaintif disebut dengan nama dalam deklatasi statutori itu. Oleh itu, tidak diragui bahawa kiriman Facebook tersebut merujuk kepada plaintif. Selanjutnya, dalam perbicaraan, defendan juga mengakui bahawa kiriman tersebut merujuk kepada plaintif. Kiriman Facebook merupakan penerbitan kepada pihak ketiga kerana individu lain telah membaca deklarasi statutori itu dan telah membuat komen. Oleh itu, fakta tentang penerbitan dan fakta tentang kiriman yang merujuk kepada plaintif itu telah dibuktikan (lihat perenggan 17–18).

(2) Plaintif merupakan peguam kanan dan pemimpin politik pada masa

matan, oleh itu, untuk mengatakan dia telah melakukan suatu yang buruk dan bahawa dia mempunyai agenda tersembunyi sepertimana dinyatakan dalam Penerbitan 1 jelas berunsur fitnah tentangnya. Berkenaan Penerbitan 2 dan Penerbitan 3, tema utama deklarasi statutori adalah bahawa plaintif telah menerima senyap-senyap beg yang penuh dengan wang tunai daripada abang Ketua Menteri Sabah yang merupakan seteru politiknya dan partinya. Dalam premis itu, deklarasi statutori jika dibaca secara keseluruhan, tanpa apa-apa keraguan menegaskan bahawa plaintif adalah seorang korup dan telah mengkhianati parti sendiri untuk keuntungan kewangan. Oleh itu deklarasi statutori itu berunsur fitnah tentang plaintif (lihat perenggan 20–21 & 25–26).

(3) Deklarasi statutori dan kepercayaan defendan bahawa ia disahkan sebenarnya tidak relevan kepada pembelaan justifikasi. Jikapun pakar tulisan tangan telah dipanggil untuk membuktikan bahawa Charles Masuil mengesahkan deklarasi statutori itu, defendan tidak terlepas daripada obligasi untuk membuktikan bahawa plaintif sememangnya telah menerima beg berisi wang daripada Datuk Ayob Aman. Dalam kes ini, defendan telah gagal membuktikan dakwaan berunsur fitnah bertulis terhadap plaintif. Selanjutnya, deponen deklarasi statutori itu, Charles Masuil juga menjadi saksi bagi pihak plaintif dan telah membatalkan kandungan deklarasi statutori itu. Oleh itu pembelaan justifikasi gagal berkaitan semua penerbitan itu (lihat perenggan 27–28).

(4) Pembelaan komen adil berkenaan Penerbitan 2 dan Penerbitan 3 gagal kerana penerbitan itu tidak 'fair' dalam erti kata bahawa kepercayaan dalamnya boleh secara jujur dipegang oleh defendan ataupun ia adalah suatu 'comment' kerana ia adalah dakwaan tulen tentang fakta dan tidak lebih daripada itu. Pembelaan komen adil tidak boleh terpakai kepada Penerbitan 1 juga kerana defendan gagal membuktikan fakta bahawa plaintif telah menerima beg berisi wang tunai itu daripada abang seteru politiknya (lihat perenggan 36–37).

(5) Jikapun pembelaan komen adil berjaya, defendan tidak boleh menggunanya kerana kewujudan niat jahat sebenar atau nyata. Dalam kes ini, defendan telah cuba untuk mensensasikan penerbitan deklarasi statutori itu dengan mengirim kenyataan 'BERITA HANGAT PILIHANRAYA ABAD INI!!' dalam huruf tebal. Selanjutnya, plaintif merupakan Ketua Bahagian Parti Keadilan Rakyat Tuaran ('PKR') pada masa matan dan merupakan calon berpotensi untuk Pilihanraya Umum. Pemimpin negara PKR juga berada di situ sebelum Penerbitan 1. Oleh itu, inferens munasabah boleh dibuat bahawa selain daripada benar-benar bersikap semberono, defendan mempunyai motif tidak jujur untuk menjejas reputasi plaintif pada masa penting itu (lihat perenggan 38–39).

(6) Ia adalah undang-undang lapuk bahawa setelah libel dibuktikan, tiada keperluan bagi plaintif membuktikan kerosakan yang diakibatkan kerana kerosakan sedemikian adalah dianggapkan. Dalam kes ini, mahkamah menolak tuntutan untuk ganti rugi teladan kerana ia tidak terangkum dalam prinsip yang dinyatakan dalam kes *Rookes v Barnard & Ors* [1964] AC 1129. Walau bagaimanapun mahkamah mendapati bahawa tuntutan untuk ganti rugi tambahan mempunyai merit kerana defendan telah mempli pembelaan justifikasi dan telah gagal membuktikannya. Oleh itu mahkamah telah mengawardkan sejumlah RM70,000 sebagai ganti rugi am dan ganti rugi tambahan. Mahkamah enggan memberikan injunksi kerana tiada keterangan yang defendan telah meneruskan memberikan penerbitan yang sama (lihat perenggan 41–43).]

Notes

For cases on libel, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 575–793.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142b (refd)
Belt v Lawes (1882) 51 LJQB 359 (refd)
Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor [2014] 4 MLJ 242; [2014] 3 CLJ 560, CA (refd)
Hoe Thean Sun & Anor v Lim Tee Keng [1999] 3 MLJ 138, HC (refd)
JB Jeyaretnam v Goh Chok Tong [1985] 1 MLJ 334 (refd)
Joshua Benjamin Jeyaretnam v Goh Chok Tong [1989] 3 MLJ 1, PC (refd)
Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd [1963] 2 All ER 151, HL (refd)
Ratcliffe v Evans [1892] 2 QB 524, CA (refd)
Reynolds v Times Newspapers Ltd and others [2001] 2 AC 127, HL (refd)
Rookes v Barnard & Ors [1964] AC 1129, HL (refd)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173, SC (refd)
Syed Husin Ali v Sharikat Pencetakan Utusan Melayu Bhd & Another [1973] 2 MLJ 56 (refd)
YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor [2012] 7 MLJ 301, HC (refd)

Ridwan Borhan (Yusri & Rizwan) for the plaintiff.
Henry Gudid (FT Ahmad & Co) for the defendant.

Ravinthran J:

INTRODUCTION

[1] This is a libel action brought by a senior lawyer and a former politician in Sabah. He alleged that the defendant defamed him via the popular social networking service known as Facebook. The defendant has not denied being

responsible for the Facebook postings or publications in question but has raised the defences of justification and fair comment.

CASE FOR THE PLAINTIFF

[2] The plaintiff is a prominent lawyer in Sabah. He served as First Class Magistrate between 1978 and 1979. Thereafter, he was admitted to the Roll of Advocates of the High Court of Sabah and Sarawak in Sabah in 1979. Since 1982, he practised on his own as advocate under the style of Messrs Ansari and Co. He was awarded the Ahli Seri Darjah Kinabalu in 1995 and was appointed a Justice of Peace in 1997 by the Head of State of Sabah. Apart from practising as a lawyer, the plaintiff had also launched a parallel political career. In the 1980's he joined the USNO and BERJAYA political parties. He was a youth leader in both parties. More recently, he had been active in Parti Keadilan Rakyat ('PKR') which is an opposition party at the Federal and State level. He held the party position of Division Chief of Tuaran from 2004 until his suspension in May of 2013. The plaintiff was also the State Chief for the PKR in 2007 and 2008. The 12th General Election was held in 2008. The plaintiff was also the PKR candidate for the Sulaman State seat and Tuaran Parliamentary seat in the 2004 and 2008 General Election. All the above undisputed facts point to the active role that the plaintiff played in the affairs of PKR in Sabah and in Tuaran District prior to his retirement from politics. The claim of the plaintiff relates to three Facebook postings made by the defendant which allegedly defamed him. For sake of convenience, I shall refer to the said Facebook postings as Publication 1, Publication 2 and Publication 3.

[3] Publication 1 is pleaded at paras 4(a) and (b) of the statement of claim. The posting in question was made on the Facebook page of one Albert Polinoh who passed away before the trial commenced. The Facebook account of the defendant was used to make the posting. It is dated 16 September 2012. It reads as follows:

(a) buat pengetahuan kamu rangtahun 1998 saya di semenanjung ... mungkin pada ketika itu tn hj sedang merebut jawatan dalam UMNO ... pada 2008 ... kalaulah kamu tahu cerita disebalik hotel le meridian ... tingkat satu ... bilik VVIP ... Tuhan saja yang tahu. ...

(b) sememangnya perkara yang tidak baik ... kita mesti berhati-hati dengan udang disebalik batu.

[4] The said posting was prefaced by a photograph of the plaintiff and the caption 'Ketua Cabang PKR P170 Tuaran'. The defendant also posted the following words later:

... perkara ini tidak berkaitan dengan mana-mana individu ...

[5] The plaintiff was the 'Ketua Cabang PKR P170 Tuaran' at the material time and therefore it can be inferred that the remarks in the posting necessarily referred to him and no other.

[6] Publication 2 is in respect of a statutory declaration published on the Facebook wall of the defendant on 25 February 2013. As is well known, a Facebook 'wall' is an area where comments can be posted or uploaded by other Facebook users. The statutory declaration was purportedly made by one Charles Masuil on 24 June 2011. The statutory declaration claims that the plaintiff met one Datuk Ayob Aman in the VIP room of the Le Meridien Hotel before the 12th General Election in 2008 and received a bag filled with cash from him. It is not disputed by the defendant that Datuk Ayob Aman is the elder brother of the Chief Minister of Sabah. Datuk Ayob Aman then allegedly wished the plaintiff success in whatever that he undertook in the future. The plaintiff also allegedly told Charles Masuil not to reveal the incident to anyone. The statutory declaration was purportedly attested by Dato Chong Ket Sui @ David Chong who is a Justice of Peace. The defendant did not deny uploading the statutory declaration in question on his Facebook wall. Following the uploading of the statutory declaration on defendant's facebook 'wall', many Facebook users posted their comments on his wall in relation to the said statutory declaration.

[7] Publication 3 occurred on 25 February 2013 when the defendant published the same statutory declaration on the wall of a Facebook group called 'TUARAN Sembang2'. A Facebook group is a Facebook account created for small group communication and for people to share their common interest and express their thoughts and opinion (see www.facebook.com/notes/facebook/facebook-tips-whats-the-differencebetween-a-facebook-page-and-group). The defendant again did not deny posting the statutory declaration on the wall of the said Facebook group page.

[8] The plaintiff gave evidence on his own behalf and called three witnesses, namely Charles Masuil, Regina Lim and Gazali bin Suhaili. The witness statement of Charles Masuil was brief. In February of 2013, he was told by a friend that a statutory declaration purportedly made by him was published on Facebook. Charles Masuil logged into his Facebook account and read the said statutory declaration. He said that he never made the statutory declaration in question. Charles Masuil also denied meeting Dato Chong Ket Vui. He said the contents of the statutory declaration were all untrue as he never ever witnessed the plaintiff receiving a bag filled with cash from Datuk Ayub Aman. He also denied telling the defendant that he related the incident to one Datuk James Ghani who is a lawyer. In the Statement of Defence, the defendant had pleaded that Charles Masuil had related the incident to the said Datuk James

Ghani. Charles Masuil also denied filling up a complaint form about the incident in question at the Complaints Secretariat of PKR.

[9] The plaintiff testified that since 2010, he had been continuously attacked by the defendant and his politician friends in an attempt to unseat him as PKR's Tuaran Division Chief. They wanted to replace him with one Edward Linggu. The attacks were based on his ethnic background and the fact that he is not from Tuaran District. Subsequently, the honesty and integrity of the plaintiff was questioned by other Facebook users who commented on the Facebook postings in question, ie Publication 1, Publication 2 and Publication 3. He said Publication 1 was made on a crucial date, ie on 16 September 2012 when PKR national leaders and other opposition leaders had converged in Tuaran District for National Malaysia Day Celebrations. He learned about Publication 2, ie the statutory declaration that was uploaded on the Facebook page of the defendant from his brother in law. The plaintiff said that the bottom of the statutory declaration in the Facebook page of the defendant was captioned 'BERITA HANGAT PILIHANRAYA ABAD INI!!' and was accompanied by his photograph. At the same time, the plaintiff discovered that the statutory declaration was also published on the Facebook wall of the 'TUARAN Sembang2' Facebook group which is open to the public. It has 810 members. The plaintiff said that he was shocked, distressed and humiliated by the contents of the said Facebook postings. He said he was defamed and brought to public ridicule, odium and contempt. Furthermore, his reputation as a senior lawyer and politician was tarnished. The plaintiff denied the allegation that he took a bag filled with cash from Datuk Ayob Aman. He also denied receiving legal fees from Datuk Ayob Aman as he never acted for him in his capacity as a lawyer. He said the suggestion that he took money from Datuk Ayob Aman meant that he had sold out to Barisan Nasional before the 12th General Election and that he is a dishonest and an untrustworthy person. At the material time the plaintiff was the PKR Tuaran Division Chief of PKR which is an opposition party at the State level. He said the defendant also made the following statements in the comment section of the 'TUARAN Sembang2' Facebook group page where the statutory declaration was posted:

> Apakah ini benar? ... ahli PKR di Tuaran perlukan penjelasan ... diharap tuan hj ansari boleh jelaskan ... kebenaran harus dicari ... Ini bukan perkara kecil!!!!!
>
> Bankrupt is another thing regi ... We the voters want to know the truth ... if the SD contain is not true ... then hj ansari should 10 summon the culprit to clear his name ...
>
> Benarkah hj ansari ada bertemu ayup aman? ... kita mau kebenaran ... tunjukkan kebenaran ... bukannya mengugut tindakan atau saman ... kalau perkara ini tidak benar ... kita mau hj ansari mengambil tindakan k.

[10] At the material time, the plaintiff was not only the PKR Tuaran Division Chief but he was also the Chairman of PKR West Coast (North) Election zone consisting of Kudat, Kota Marudu, Tuaran, Kota Belud, Ranau, Sepanggar and Putatan Parlimentary Constituencies. The plaintiff believed that the defendant and his friends did not want him to be renominated to be the PKR candidate for the Tuaran Parliamentary Constituency in the General Election. He said the defendant and his friends succeeded in their mission. The plaintiff contacted Charles Masuil and asked him about the statutory declaration but he denied making it. The plaintiff then lodged a police report.

[11] The third witness for the plaintiff, Regina Lim is an active PKR member at the Tuaran Division. She read the postings in question on Facebook and warned the defendant about facing the consequences. She said the postings put the plaintiff in a bad light at the time when he was touted as a PKR candidate for Tuaran Parliamentary Constituency in the coming elections. She said the postings and comments made by the defendant was a hot political topic in Tuaran at that time.

[12] The final witness for the plaintiff was Gazali bin Suhaili. He is a former teacher. He became an active member of PKR in February of 2012. However, he left PKR after the 2013 General Election. He is now a member of another political party, ie UPKO. He said he read the statutory declaration in question that was posted on the 'TUARAN Sembang2' Facebook group page. He said he was shocked to read the postings and his confidence in the leadership of the plaintiff whom he admired was shaken.

CASE FOR THE DEFENCE

[13] The first witness for the plaintiff was James Stephen Dionysius. He is an ordinary member of PKR now. He said two weeks before the 25 or 26 June 2011, he was called to the law office of Datuk James Ghani. He said he met a man who was introduced as Charles Masuil. He said the said Charles Masuil claimed that the plaintiff met Datuk Ayob Aman before the 2008 General Election in a private room at the Le Meridien Hotel in Kota Kinabalu. He said Charles Masuil wanted to report the matter to the President of PKR whose visit to Sabah was then imminent. He said Charles Masuil then signed a statutory declaration and a complaint form.

[14] The second witness was the defendant himself. He admitted uploading a photograph of the plaintiff together with the statutory declaration in question on 25 February 2013 on the wall of his Facebook. He obtained the statutory declaration of Charles Masuil from James Stephen Dionysius. At that time, he believed in the contents of the statutory declaration made by Charles Masuil. However, he agreed that he was not personally acquainted with Charles

Masuil. He also posted comments in the 'TUARAN Sembang2' Facebook page group in relation to the statutory declaration because of his right as a voter and a member of PKR in Sulaman and Tuaran. He admitted making the following comments on the Facebook page of Albert Polinoh:

> buat pengetahuan kamurang tahun 1998 saya di semenanjung ... mungkin pada ketika itu tn hj sedang merebut jawatan dalam UMNO ... pada 2008 ... kalaulah kamu tahu cerita disebalik hotel le meridian ... tingkat satu ... bilik VVIP ... Tuhan saja yang tahu ...' dan juga 'sememangnya perkara yang tidak baik ... kita mesti berhati-hati dengan udang disebalik batu.

[15] He said his comment was based on what Albert Polinoh told him. He also made the following comment in a later posting:

> ... perkara ini tidak berkaitan dengan mana-mana individu ...

[16] During cross-examination, he agreed that he did not check the veracity of the statutory declaration because he was not acquainted with Charles Masuil and did not know how to contact him. He also agreed that he knew about the Le Meridian Hotel incident before the statutory declaration was given to him because he heard about it from Albert Polinoh. However, he could not call him as a witness as he died recently.

The third and last witness for the defendant was Dato Chong Ket Sui JP. He recognised his signature and his Justice of Peace stamp on the statutory declaration in question. However, he could not remember Charles Masuil as he signs documents for members of the public every day. He said he would have checked the identity card of Charles Masuil before attesting the statutory declaration.

ISSUES

[17] In the instant case, the plaintiff's case is anchored on three alleged libellous Facebook postings. The defendant's Facebook account appears to have been used for the three postings which I have referred to as Publication 1, Publication 2 and Publication 3. As stated in the evidence that I summarised above, the defendant has not denied being responsible for the Facebook postings in question. In the premises, the fact of publication by the defendant is undisputed. However, in the statement of defence, the defendant had raised the defences of justification and fair comment. Therefore, the only issues that require determination in this trial are as follows:

(a) whether the Facebook postings refer to the plaintiff?

(b) whether they are defamatory of the plaintiff?

(c) whether the defence of justification has been proven?

(d) whether the defence of fair comment has been proven?

Whether the Facebook postings refer to the plaintiff?

[18] Before I discuss the above mentioned issues, I shall also, for sake of completeness, briefly consider the issues that are not in dispute. In the statement of defence, the defendant did not deny that the Facebook postings in question referred to the plaintiff. Publication 1 is in respect of the posting on the Facebook page of Albert Polinoh by the defendant. It referred to a 'tn hj' which is an abbreviation of 'Tuan Haji'. There is no dispute that the plaintiff is referred to as 'Tuan Haji Ansari'. In fact during cross-examination, the defendant also referred to the plaintiff as 'Tuan Haji Ansari'. The posting was prefaced by a photograph of the plaintiff. In the premises, the latter posting by the defendant that the posting about the Hotel Le Meridien incident was not in respect of any particular individual is meaningless as the plaintiff was clearly identified as the target of it. Publication 2 is in respect of the posting of the statutory declaration in question on the Facebook wall of the defendant. The plaintiff is mentioned by name in the statutory declaration. He is alleged to have received a bag filled with cash from the brother of the Chief Minister. Publication 3 refers to the posting of the same statutory declaration on the wall of a Facebook group by the name of 'TUARAN Sembang2'. In the premises, there is no doubt whatever that the Facebook postings in question referred to the plaintiff. Furthermore, during the trial, defendant also admitted that the posting on the Facebook page of Albert Polinoh and the statutory declaration that was reproduced on the Facebook walls of the defendant and 'TUARAN Sembang2' Facebook group referred to the plaintiff. There is also no denial that the Facebook postings in question constituted publication to third parties. The plaintiff testified that the 'TUARAN Sembang2' Facebook group is an 'open' group which means that anyone can access it. In the comment section of the Facebook group page, several individuals had made comments on the postings in question. The printout of the Facebook page of Albert Polinoh and the defendant also shows that other individuals had read the statutory declaration and had made comments. As the fact of publication and the fact that the postings referred to the plaintiff has been proven, I shall now move to consider whether the postings in question are defamatory. The burden to establish that the postings are defamatory lies on the plaintiff.

Whether defamatory?

[19] The test to be employed to determine whether the published words in question bear a defamatory meaning has been discussed in numerous cases. The thread that runs through these cases is that the published words in question are deemed to be defamatory if they have the tendency to lower the reputation of the plaintiff in the mind of the hypothetical reasonable man (see

Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd [1963] 2 All ER 151). It does not matter if the plaintiff's reputation is not actually lowered or that he otherwise does not suffer any damage from the publication of the libel. The test is objective and thus it is sufficient if the published words have the tendency to lower the reputation of the plaintiff. Whether the words are defamatory or not is essentially a question of law. In *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334, LP Thean J asked the following question to determine if the words complained of were defamatory:

> The crucial point in this issue is this: did the words complained of in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If they did, then inescapably they were defamatory of the plaintiff.

[20] In *Syed Husin Ali v Sharikat Pencetakan Utusan Melayu Bhd & Another* [1973] 2 MLJ 56, Mohd Azmi J formulated the test as follows:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

[21] As stated in the summary of the evidence, the plaintiff has pleaded that he was defamed by three postings on Facebook. Publication 1 refers to the comment made by the defendant on the Facebook page of Albert Polinoh which I had reproduced earlier. The defendant stated that only God knows what the plaintiff had done in a hotel room in 2008 which means that the plaintiff had good reason to hide whatever he did from becoming public knowledge. It further says explicitly that what the plaintiff did was a bad thing (*perkara tidak baik*) and that what he did had a hidden meaning or agenda (*udang di sebalik batu*). As stated earlier, the plaintiff is a senior lawyer and political leader at the material time. Thus to say that he had done a bad thing (which only God knows) and that he had hidden agenda is clearly defamatory of him. It also portended the intention of the defendant's to publish further defamatory material about the plaintiff. This happened when the statutory declaration purportedly deposed by Charles Masuil was uploaded on Facebook. I shall now refer to the said statutory declaration.

[22] Publication 2 and Publication 3 are in respect of the statutory declaration that was posted to the Facebook walls of the defendant and the 'TUARAN Sembang2' group. The plaintiff has pleaded that the defamatory sting of the statutory declaration is found in paras (4), (5) and (6):

4. Kami berada di bilik tersebut hanya untuk seketika sahaja dimana AYUB AMAN telah memberikan sebuah bag yang penuh duit kepada Haji Ansari Abdullah dan mengucapkan 'selamat berjaya? dalam apa sahaja yang dia buat.

5. Semasa di dalam kereta dalam perjalanan balik, Haji Ansari Abdullah mengesahkan bahawa dia telah menerima bag yang berisi duit dan mengingatkan saya untuk tidak beritahu kepada sesiapa pun mengenai perkar atersebut.

6. Haji Ansari Abdullah telah mengatakan 'ANGGAPLAH SAJA INI YURAN GUAMAN SEKIRANYA PRESIDEN INGIN MENYOAL SAYA SECARA PERSONAL, SAYA TELAH BERSEDIA UNTUK BERJUMPA PRESIDEN ATAU KETUA UMUM'.

[23] The plaintiff is relying on the ordinary and natural meaning of the pleaded words to prove his claim. In para 7, he pleaded that the literal and ordinary meaning of the words conveyed the following imputation:

(a) The Plaintiff had received a bag of money from Datuk Ayub Aman before the 12th General Election;

(b) The Plaintiff had committed corruption by surreptitiously receiving a bag of money from Datuk Ayub Aman, the elder brother of the Chief Minister of Sabah Datuk Musa Aman who was also the Chairman of Sabah Barisan Nasional, Liason Chief of Sabah UMNO and Supreme Council Member of UMNO before the 12th General Election held in March, 2008;

(c) That the Plaintiff who was the State Chief for Parti Keadilan Rakyat (PKR) in 2007–2008 had sold out to the Barisan Nasional;

(d) That the Plaintiff had conspired with Datuk Ayub Aman and or Datuk Musa Aman to ensure that PKR will lose in all seats it contested in Sabah during the 12th General Elections;

(e) That the Plaintiff is a dishonest and untrustworthy person; and

(f) That the Plaintiff had committed offences under section 10 and 11 of the Anti Corruption Act, 1997 and the Election Offences Act.

[24] The defendant pleaded that the words of the statutory declaration do not bear a defamatory meaning. In para 5 of the statement of defence, the defendant pleaded that the statutory declaration only bore the following meaning to the ordinary reader:

(1) The plaintiff is a senior practising lawyer;

(2) Datuk Ayob Aman had retained the plaintiff as his lawyer;

(3) That the money was meant to be plaintiff's legal fees;

(4) That to avoid being misconstrued the plaintiff would explain to Datuk Anwar Ibrahim on the retainer.

[25] The suggestion in the statement of defence that the bag filled with cash was legal fees and therefore the defamatory sting had been removed from the statutory declaration is without merit. It is stated in para 2 of the statutory declaration that the incident at the Le Meridien Hotel occurred just before 2008 General Election. It is not disputed that the plaintiff was the State Chief for PKR which is an opposition party at the state level at the material time. He was also the Tuaran Division Head of PKR. It is also not disputed that Datuk Ayob Aman is the brother of the Chief Minister who is the head of the ruling party at the State level at the material time. The statutory declaration says that the plaintiff and Datuk Ayob Aman had whispered quietly in the room. The plaintiff then told Charles Masuil not to tell anyone about the incident. Furthermore, it is alleged in the statutory declaration that the plaintiff declared to Charles Masuil that he would say that the payment is legal fee only if he is questioned by the leaders of his party. There is no mention in the statutory declaration that the plaintiff had accepted a retainer to act for Datuk Ayob Aman. The payment was made in a hotel room at night. It was not made via cheque but cash. Thus, the central theme of the statutory declaration is that the plaintiff had stealthily received a bag filled with cash from the brother of the Chief Minister who is his political rival and that of his party. In the premises, the statutory declaration if read as a whole, unmistakably insinuates that the plaintiff is corrupt and had betrayed his own party for monetary gain. I therefore find that statutory declaration that is the subject of Publication 2 and Publication 3 is highly defamatory of the plaintiff.

Justification

[26] A justification plea means that the published words and the imputation it conveys are true. It is an absolute defence if proven successfully because even the presence of malice which is presumed in defamation cases cannot defeat it.

[27] In other words, what is truly stated, however vile and venomous it may appear to be the ordinary reader, cannot be defamatory. The defendant pleaded justification as a defence in para 7 of the statement of defence. The basis for the plea of justification can be summarised as follows:

(a) one James Stephen Dionysius, the Executive Secretary of PKR had confirmed to him that Charles Masuil had talked about the incident referred to in the statutory declaration;

(b) the statutory declaration was affirmed before a Justice of Peace;

(c) that Charles Masuil had filed the statutory declaration together with a complaint form at the Complaint Secretariat of PKR; and

(d) that the defendant posted the entire statutory declaration in its original form.

[28] The burden to prove the defence of justification lies upon the defendant as the law presumes that defamatory words are false (see *Belt v Lawes* (1882) 51 LJQB 359). The burden must be discharged on a balance of probabilities. In my opinion, the defendant has completely failed to prove the defence of justification. My reasons are as follows. The defence of justification is only based on the statutory declaration of Charles Masuil and the belief of the defendant that it was true. I agree with counsel for the plaintiff that the statutory declaration and the belief of the defendant that it was truly affirmed are irrelevant to the defence of justification. The sting of the defamation in relation to Publication 2 and Publication 3 is that the plaintiff received a bag filled with cash from Datuk Ayob Aman at the Le Meridien Hotel just before 2008 General Election. Thus it is incumbent on the defendant to prove that the plaintiff had received a bag filled with cash as alleged in the statutory declaration. Thus, it would not be sufficient to prove that Charles Masuil made the statutory declaration in question or that the defendant believed it to be true. Therefore, even if a handwriting expert had been called to prove that the Charles Masuil affirmed the statutory declaration in question which he recanted at the trial, defendant is not relieved of the obligation to prove that the plaintiff had indeed received the bag of money from Datuk Ayob Aman. Thus the pivotal issue is not whether Charles Masuil signed the statutory declaration in question but it is whether the plaintiff had received the bag filled with cash from Datuk Ayob Aman. The following passage from the case of *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142b gives an idea of the onerous burden on the defendant who attempts to rely on the defence of justification:

> To establish a plea of justification, the defence must prove that the defamatory imputation is true. It is not enough for him to prove that he believed that the imputation was true, even though it was published as belief only. If A says of B that A believes B committed murder A cannot justify by saying and proving that A did believe it. A can only justify by proving the fact of murder. Similarly, if the defendant has written that A said that B, the plaintiff, had been convicted of theft it will be no defence for the defendant to prove that A did tell him so, that he honestly believed what A said, and only repeated it. He must prove as a fact that B was convicted of theft. If A repeats a rumour A cannot say that it is true by proving that the rumour in fact existed. A must prove that the subject-matter of the rumour is true.

[29] This point was repeated in the more recent Court of Appeal case of *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242; [2014] 3 CLJ 560 where Abang Iskandar JCA cautioned as follows:

> In relying on the defence of justification the burden of proof is on the defendant to prove that the allegations made are true or are substantially true. The defendant must prove it on the balance of probabilities, that is, the allegation is more likely than not to be true. For example, an allegation published by repeating a rumour

> cannot be justified by proving that there was such a rumour. A defendant is required to prove the substance of the allegation. Since the burden of proving the truth of an allegation is on the defendant, claimants enjoy a distinct advantage in defamation claims. Justification has to be used with great care. It can often be difficult to obtain sufficient admissible evidence to persuade the judge that the statement is true.

[30] In the instant case, the defendant completely failed to prove the libellous allegation that the plaintiff had received a bag filled with cash from the brother of a political rival. In any event, Charles Masuil, the deponent of the statutory declaration, did not testify on the defendant's behalf to verify the allegations in the statutory declaration. On the contrary, Charles Masuil took the witness stand on behalf of the plaintiff and repudiated the contents of the statutory declaration. He denied going to the Le Meridien Hotel with the plaintiff on the night in question. The defendant did not procure any other witness or other evidence to prove the sting of the defamatory allegation in question. Thus, the defence of justification collapsed hopelessly like a house of cards in relation to Publication 2 and Publication 3. In relation to Publication 1, the defendant had said that the plaintiff had done something bad and that what he did had a hidden agenda. I found that Publication 1 is defamatory in its ordinary and natural meaning. During the trial, the defendant attempted to prove the plaintiff had committed 'the bad thing' (*perkara yang tidak baik*) referred to in Publication 1 which is the allegation that the plaintiff received a bag filled with cash from the brother of a political adversary. As I said earlier, the defendant failed to prove the said allegation and therefore the defence of justification fails in respect of Publication 1 as well.

Fair comment

[31] In para 8 of the statement of defence, the defendant pleaded fair comment on a matter of public interest as a defence. Paragraph 8 reads as follows:

> 8. Further or alternatively, the comments and publication made by the Defendants under paragraphs 4, 5 and 6 of the Statement if Claim are fair comment upon a matter of public interest namely as to whether the plaintiff should be a candidate for Parti Keadilan Rakyat in the 13th General Election. The Defendant will rely on the statutory declaration affirmed by the said Charles masuil for the particular of facts and matters on which the comment was made.

[32] In *Joshua Benjamin Jeyaretnam v Goh Chok Tong* [1989] 3 MLJ 1, the Privy Council referred to four crucial elements in relation to the defence of fair comment. They are as follows:

(a) the words complained of are comment, although they may consist or include inferences of fact;

(b) the comment is on a matter of public interest;

(c) the comment is based on facts; and

(d) the comment is one which a fair-minded person can honestly make on the facts proved.

[33] I shall first consider whether the defamatory words in question are comments. An oft-quoted elucidation of the distinction between a comment and an allegation of fact is found at p 697 of *Gatley on Libel and Slander* (8th Ed). It reads as follows:

> Comment is a statement of opinion on facts. It is comment to say that a certain act which a man has done is disgraceful or dishonourable; it is an allegation of fact to say he did the act so criticized ... while a comment is usually a statement of opinion as to merits or demerits of conduct, an inference of fact may also be a comment. There are, in the cases, no clear definitions of what is comment. If the statement appears to be one of opinion or conclusion, it is capable of being comment.

[34] As I said earlier, the defamatory words in relation to Publication 2 and Publication 3 are that the plaintiff took a bag filled with cash from the brother of his political adversary. This is the sting of the defamation. Assuming that the fact that the plaintiff took a bag filled with cash from Datuk Ayob Aman had been proven and the defendant had proceeded to make a statement that it was a dishonourable thing to do, it would amount to a comment. However, the defendant merely repeated the unfounded allegation that the plaintiff took a bag filled with cash. Therefore, it is an allegation of fact and not a comment. I am mindful that the defendant said that he is a registered voter in Tuaran and that it is his right to join the political discussion on Facebook with other voters. However, the crucial point that escaped the defendant is that the plaintiff has not taken issue with any of the comments he made in the course of the political discussion. The basis of the instant defamation action has to do with the posting of the statutory declaration that alleged that the plaintiff received a bag filled with cash from the brother of a political rival. The defendant told the court that he merely posted the original statutory declaration on Facebook and was not responsible for its contents. However, under defamation law, repeating a libellous allegation made by someone else constitutes defamation unless the defendant is able to prove it. In *Gatley on Libel and Slander* (8th Ed), the following quote appears at p 117 (cited in *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham & Anor* [2012] 7 MLJ 301):

> Every republication of a libel is a new libel and each publisher is answerable for his act to the same extent as if the calumny originated with him.

[35] Thus the defendant cannot rely on the argument that he 'merely' posted the statutory declaration in question for discussion. Coming back to the defence of fair comment, the defendant failed to prove that the posting in

question is a comment and even if it was a comment, he failed to prove that it had a factual basis. I shall now move to consider whether the publication of it was in the public interest. As the plaintiff was a public figure and at the material time was a potential candidate for the General Election, I find that it was in the public interest if it had factual basis. But as I said earlier, it had no factual basis. The defendant also failed to prove that the so-called comment was 'fair'. In the case of *Reynolds v Times Newspapers Ltd and others* [2001] 2 AC 127, Lord Nicholls of Birkenhead who wrote the leading judgment at the House of Lords said 'fair' in 'fair comment' means 'honest'. His Lordship said as follows:

> Traditionally one of the ingredients of this defence is that the comment must be fair, fairness being judged by the objective standard of whether any fair-minded person could honestly express the opinion in question. Judges have emphasised the latitude to be applied in interpreting this standard. So much so, that the time has come to recognise that in this context the epithet 'fair' is now meaningless and misleading. Comment must be relevant to the facts to which it is addressed. It cannot be used as a cloak for mere invective. But the basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable person who sits on a jury. The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it: see Diplock J in *Silkin v Beaverbrook Newspapers Ltd* [1958] 2 All ER 516 at p 518,; [1958] 1 WLR 743 at p 747.

[36] In the instant case, I see no ground to hold that the defendant held an honest belief in the truth of the libellous allegation as he did not bother to verify its truth either from the maker (Charles Masuil) or from the plaintiff or from Datuk Ayob Aman before posting it to Facebook and thereby making it available for the world at large. As suggested by counsel for the plaintiff during cross-examination, the defendant could even have lodged a police report or reported the matter to the Malaysian Anti-Corruption Commission to be investigated but he did not do so. Thus, the defence of 'fair comment' in relation to Publication 2 and Publication 3 fails because the publication was neither 'fair' in the sense that belief in it could be honestly held by the defendant nor was it a 'comment' by any stretch of imagination as it was a pure allegation of fact and no more.

[37] In respect of Publication 1, ie the insinuation posted by the defendant on the Facebook of Albert Polinoh that the plaintiff had done something bad with a hidden motive and that only God knows what had happened, it cannot be construed as a comment in the first place because there was no factual basis for the so-called comment in the first place. The factual foundation that the defendant attempted to establish was that the plaintiff received a bag filled with cash from the brother of his political adversary. However, I found that the defendant failed to prove that fact. Thus the defence of fair comment cannot apply to Publication 1 as well.

Malice

[38] In the instant case, I found that the defendant failed to prove the defence of fair comment. However, even if the defence of fair comment succeeded, I find that the defendant cannot avail it because of the presence of actual or express malice. The defence of fair comment is not absolute as it can be defeated by presence of actual or express malice as opposed to presumed malice. The burden to prove actual malice lies on the plaintiff (see *Hoe Thean Sun & Anor v Lim Tee Keng* [1999] 3 MLJ 138). I shall now give my finding on the issue of malice for sake of completeness. Malice in defamation law has been defined to include dishonest motives or making use of an occasion for some indirect purpose. It does not necessarily mean ill will or personal spite (see *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142b. Furthermore, the defendant had attempted to sensationalise the publication of the statutory declaration by posting the remark 'BERITA HANGAT PILIHANRAYA ABAD INI!!' in bold. I am mindful that the defendant denied posting the said caption but in my opinion, the denial beggars belief as the statutory declaration was admittedly uploaded from his Facebook account. It was undisputed that the plaintiff was the Tuaran PKR Division Chief at the material time and was a potential candidate for the General Election. It was also undisputed that the national leaders of PKR were in town on the eve of Publication 1. Therefore, a reasonable inference can be drawn that apart from being utterly reckless, the defendant had a dishonest motive to attack the reputation of the plaintiff at a crucial time. Furthermore, as I said earlier the defendant had been reckless and therefore he must be treated as if he knew that the sting of the defamation found in the statutory declaration was false. In the case of *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173, Wan Hamzah SCJ said as follows on the consequence of recklessness in making a defamatory statement:

> The mere proof that the words are false is not evidence of malice, but proof that the defendant knew that the statement was false or that he had no genuine belief in its truth when he made it would usually be conclusive evidence of malice. *If the defendant publishes untrue defamatory matter recklessly without considering whether it be true or not, he is treated as if he knew it to be false*. (Emphasis added.)

[39] Thus, in this case as the defendant was utterly reckless and there is evidence to draw an inference that he had indirect motive to attack the plaintiff, he cannot avail the defence of fair comment in any event.

[40] In the premises, I find that the plaintiff has succeeded in proving on a balance of probabilities that he was defamed by the defendant. I shall now assess the damages that should be awarded to the plaintiff.

Damages

[41] It is trite law that once libel is proven, there is no requirement for the plaintiff to prove resulting damage for such damage is presumed. In *Ratcliffe v Evans* [1892] 2 QB 524 at p 528, Bowen LJ made the following classic statement:

> The law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation.

[42] In the statement of claim, the plaintiff prayed for general damages of RM10m and further RM10m for aggravated and exemplary damages. Theclaim for exemplary damages must be dismissed as it does come within the principles set out in the case of *Rookes v Barnard & Ors* [1964] AC 1129. However, the claim for aggravated damages has merit as the defendant had pleaded the defence of justification and had failed to prove it. Furthermore, despite the failure of defendant to procure any evidence to support the defence of justification, he insisted in maintaining the said defence. An award for aggravated damages can be included in the general award of compensatory damages. The normal factors the court would consider in assessing damages would be the nature of the defamation, the social standing of the victim and the extent of the circulation of the defamatory statement. It cannot be disputed that the plaintiff has high social standing. He is one of most senior and prominent lawyers in Sabah. He has been active in politics for a long time and had even been appointed a Justice of Peace by the Head of State of Sabah. The libellous allegation is serious as it indirectly alleged criminality on the part of the plaintiff, ie he had corruptly sold out his party for financial reward. It also had a tendency to damage the professional reputation of the plaintiff as an advocate. In respect of the extent of the circulation, it can be fairly said that a good number of voters or local political activists had viewed the postings. Some of them posted their own comments on the comment section of the Facebook of Albert Polinoh, the Facebook of the defendant and the Facebook of the 'TUARAN Sembang2' Facebook group. Furthermore, the 'TUARAN Sembang2' Facebook group is an open Facebook group and has 810 members. However, in my view, a very high award is not justified in the instant case as the plaintiff did not hold high political office is therefore not known nationally or internationally unlike the victim in the cases cited by the counsel for the plaintiff. Having considered all the circumstances of the case, I shall award the plaintiff the sum of RM70,000 as general and aggravated damages.

[43] However, I find it unnecessary to grant an injunction against the defendant to stop further similar publications as there is no evidence that the defendant had continued to do so. In respect of costs, the counsel for the plaintiff has suggested RM15,000 whereas counsel for defendant suggested costs of RM10,000. In my view, given the fact that it was a trial in the High Court, the costs of RM15,000 claimed by the plaintiff is very reasonable. I shall therefore order the defendant to pay costs of RM15,000 to the plaintiff.

Claim allowed with costs of RM15,000.

Reported by Dzulqarnain Ab Fatar